No. 82-1832

IN THE

Supreme Court of the United States

October Term, 1984

TOWN OF HALLIE, ET AL.,

Petitioners,

vs.

CITY OF EAU CLAIRE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE THE TOWN OF ST. CLOUD, MINNESOTA

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I.

INTEREST OF THE AMICUS CURIAE

The Town of St. Cloud, Minnesota, is an urban town of the State of Minnesota, acting pursuant to the authority and powers granted to it by the Minnesota Legislature under the provisions of the Minnesota Constitution and Statutes.[1]

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[1]No letters of consent from the Petitioners and Respondents to the filing of the brief have been obtained since, under Rule 42(4), *amicus curiae* Town of St. Cloud need not obtain such consent as a political subdivision of a State which is filing an *amicus curiae* brief sponsored by its authorized law officers.

The interest of the Town of St. Cloud in this case is based upon a pending action that it has commenced in the United States District Court for the District of Minnesota, *Town of St. Cloud v. City of St. Cloud*, Civil Action No. 6-84-164. That action, like the one pending before the Court, involves a challenge to the City of St. Cloud's practice of requiring annexation of areas of the Town as a prerequisite to the receipt of wastewater treatment services by the residents therein. Many of the legal issues in that action are similar to the one at hand, and a decision by the Court in this case may have an impact upon the pending action of *amicus curiae*.

II.

PRELIMINARY REMARKS

Our purposes in appearing as an *amicus curiae* before this Court is to support the position of our fellow townships in the pending action, and to reaffirm the principle that a municipality, as well as any other form of local government, is bound by the antitrust laws of this nation, and cannot hide behind the veil of alleged state authority for anti-competitive actions in illegally exploiting a monopoly over wastewater treatment services in such a manner as to destroy neighboring communities as developing and competing taxing jurisdictions.

Like the City of Eau Claire, the City of St. Cloud, on behalf of itself and various other area communities, applied in the early 1970's for a federal grant under the Federal Water Pollution Control Act (33 U.S.C. § 466 *et seq.*, now covered by 33 U.S.C. § 1251, *et seq.)* for a federal construction grant to build a wastewater treatment facility for the St. Cloud Metropolitan Area. That area includes the City of St. Cloud and various surrounding incorporated

and unincorporated local government units, including the Town of St. Cloud. The federal grant was made after various conditions were set and agreements made between the Federal Government, State of Minnesota and the City of St. Cloud. The wastewater treatment facility commenced service in 1975.

The City of St. Cloud subsequently entered into agreements with two adjoining cities for wastewater treatment services. Those two cities currently transport wastewater to the St. Cloud area facility for treatment. The City is currently negotiating similar agreements with two other nearby cities. Annexation to the City of St. Cloud is not a condition of any of these agreements.

The wastewater treatment facility is located within the corporate limits of the City of St. Cloud. Because of the location of the facility in the City limits, and because the treatment facility is controlled by the City, the City, in effect, enjoys a monopoly power of control over the facility.

The Town of St. Cloud has intended to construct its own sewer system for the collection and transportation of wastewater to the interceptors within the city limits and from there to the treatment facility. However, the City has consistently refused to allow the Town to connect its sewers for the transportation of wastewater to the treatment facility, unless the Town agrees to onerous annexation terms. Also, certain City officials have made threatening statements to the officials of the Town concerning exorbitant prices the City would exact from the Town as a condition to the Town tying its sewers into the St. Cloud area wastewater treatment system.

It has also come to the attention of the officials and counsel for the Town that various anticompetitive tying

arrangements, combinations and other illegal contracts, agreements and arrangements for wastewater treatment services have resulted from the actions of the City in coercing individuals, land developers and other entities to annex to the City as a precondition to receiving wastewater treatment services.

The above facts formed the basis for the Town of St. Cloud's complaint against the City of St. Cloud, filed in U.S. District Court for the District of Minnesota, in early February, 1984. The Town's bases for jurisdiction, among others, were section 2 of the Sherman Act (15 U.S.C. § 2); the Federal Civil Rights Act (42 U.S.C. § 1983); and a pendent state claim under the Minnesota Antitrust Act (*Minn. Stat.*, Ch. 325D, *et seq.*). The City of St. Cloud moved to dismiss the Town's complaint, based on the "state action" exemption announced by this Court in *Parker v. Brown*, 317 U.S. 341 (1943).

On May 14, 1984, the District Court, ruling from the bench, found that the state action exemption did not apply in the case, and denied the City's motion to dismiss the state and federal antitrust and civil rights claims. We believe that such analysis is applicable not only to the *City of St. Cloud* case, but also to the case at hand.

III.

ARGUMENT

A. The State action doctrine demands legislative specificity.

The Supreme Court held in *Parker v. Brown, supra,* that the federal antitrust laws, specifically the Sherman Act, did not reach actions directed by a state legislature. Furthermore, in *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 (1978), a plurality of the Supreme Court held that municipalities were protected from antitrust liability when they acted "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413. Furthermore, the Court found that the state policy need not be spelled out in great detail; a finding only had to be made that the legislature contemplated the kind of action complained of, in granting a governmental entity the authority to operate in a particular area. *Id.* at 415.

In *Community Communications Co., Inc., v. City of Boulder, Colorado,* 455 U.S. 40 (1982), a majority of the Supreme Court adopted the *City of Lafayette* plurality opinion as the majority rule, adding the requirement that to be exempt under the Sherman Act, the municipal action must be "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Id.* at 52. The state action doctrine "is not satisfied when the state's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Id.* at 55 (emphasis in original).

In a recent, detailed analysis of the state action antitrust exemption in the municipal wastewater treatment context, the U.S. District Court for the Northern District of Illinois set forth the following rule in *Vickery Manor Service v. Village of Mundelein,* 575 F. Supp. 996, 999 (D.C., N.D., Ill., 1983) (emphasis added):

> "*City of Boulder* established an important guide for future cases: a general grant of power to a local governmental unit does not necessarily immunize subsequent anticompetitive conduct pursuant to that grant.

> Thus, as in *City of Boulder*, a municipality's actions may clearly be lawful under state law but not lawful under federal antitrust law. 455 U.S. at 52, n. 15, 102 S.Ct. at 841, n. 15. *Courts scrutinizing antitrust claims against municipalities therefore should look not at whether the municipality's action was authorized under state law but whether the municipal action was pursuant to a specific legislative intention that competition could be displaced.*"

The *Vickery Manor* court considered all the major state action exemption cases, in ruling upon a motion to dismiss an antitrust complaint brought by a group of plaintiffs against a municipality that asserted monopoly powers over sewage treatment services in a manner so as to displace competition from plaintiffs. The District Court in *Vickery Manor* analyzed a state statutory scheme involving sewage treatment services and found that the state statutes made no mention whatsoever of monopoly power for municipalities, but were merely neutral grants of power under the Supreme Court criteria in *City of Boulder*. *Vickery Manor*, *supra* at 1004. The District Court went on to state that a municipal action must not merely be lawful under state law but must be pursuant to a legislative intent to permit the displacement of competition in order to qualify for the state action exemption. *Id.*

B. The Minnesota statutory scheme is an example of a neutral state scheme contemplated in the *City of Boulder* case.

In Minnesota, the legislature has made extensive grants of power and authority to both towns and cities concerning wastewater treatment services. In Minnesota, towns are

divided into two categories, towns and urban towns. Towns are generally governed by and are subject to the provisions of *Minn. Stat.* Ch. 365. This form of unincorporated local governmental entity has somewhat limited powers. Urban towns, like the Town of St. Cloud, are a form of unincorporated local government that have been granted special, extensive powers by the legislature in addition to the other powers granted towns in general, and enjoy broad police powers regarding the public peace, health, safety and welfare such as that enjoyed by a city. Urban towns are defined at Minn. St. §368.01, subds. 1 and 1a. In effect, a Minnesota urban town is an unincorporated municipality. See generally, *Minn. Stat.* §368.01, *et seq.*

The extensive powers granted urban towns by the State of Minnesota includes wastewater treatment services, sewers and waterworks. For example, *Minn. Stat.* §368.01, subd. 3, grants urban towns the power to establish and maintain sewers and to alter, widen or straighten water courses. *Minn. Stat.* §368.01, subd. 6, gives urban towns the power to provide and by ordinance to regulate the use of wells, cisterns, reservoirs, waterworks and other means of water supply. Under *Minn. Stat.* §368.01, subd. 14, an urban town may provide for or regulate the disposal of sewage and to provide for the cleaning of and the removal of obstructions from any waters in the town and prevent their obstruction or pollution. Furthermore, an urban town has the power of eminent domain equal to a city for the purpose of acquiring rights-of-way for sewage or drainage purposes and an outlet for sewage and drainage within or without the town limits (*Minn. Stat.* §368.01, subd. 27). A town may also specially assess property owners for sewer improvements under *Minn. Stat.* §429.011, subd. 2.

The Minnesota Statutes contain many other provisions granting towns in Minnesota, particularly urban towns, various police and other broad powers which parallel the grants of authority given to incorporated municipalities by the legislature.[2]

The existence of specific Minnesota statutes granting urban towns broad police powers and extensive powers concerning the construction and financing of sewers and wastewater treatment facilities, among others, evidences a neutral legislative intent allowing towns to compete with cities for the provision, purchase and receipt of commodities and services, and the development of taxing base that ensues. There is no Minnesota statute specifically or even impliedly requiring annexation as a precondition to provision of or extension of sewers or wastewater treatment services to a town by a city.[3]

C. A city may not abuse its monopoly over wastewater treatment services so as to harm a competing taxing subdivision.

A statement from another recent U.S. District Court decision concerning a case brought under state and federal antitrust and civil rights laws and other grounds, is applicable to the case before the Court, and holds that unlawful exploitation attempted by a governmental monopolist, such

[2]See, e.g., *Minn. Stat.* §368.01, subd. 19 (general police powers); *Minn. Stat.* §368.01, subd. 28 (additional powers as possessed by cities); *Minn. Stat.* Ch. 365 (general provisions).

[3]See *Minn. Stat.* §444.075, subd. 3, which sets forth that a city must "impose *just and equitable* charges for the use *and* for the *availability* of such facilities *and* for *connections* therewith" (emphasis added). That subdivision also contains language regarding "reasonable charges" to be charged by a city for various services, including sewage treatment.

as the City herein, rises to a violation of federal antitrust law:

> "Nothing in the statutes or regulations cited by defendants authorizes or even contemplates that defendants' power could be used to such an end [monopoly power over sewage treatment]. It is one thing to say that defendants were authorized under state law to control sewage treatment in their region. But even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization'."

LaSalle National Bank v. County of Lake, 479 F. Supp. 8, 14 (D.C., Ill., 1984), *citing City of LaFayette, supra*, at 389.

In the *City of St. Cloud* case, as in this case, a city has attempted to wield its monopoly control over wastewater treatment services so as to force town residents and property owners to annex to the city in a manner not contemplated or authorized by the laws of the state. This illegal, anticompetitive conduct can hardly be termed a "traditional municipal function," as the Seventh Circuit erroneously termed such activity in the decision under review. See *City of Eau Claire, supra* at 384-85.

IV.

CONCLUSION

We submit that a political subdivision of a state can be held liable under the federal antitrust laws for the abuse of monopoly control of wastewater treatment services, when the state statutory scheme, such as that found in Minnesota, is neutral with regard to the provision of such services. "Use

of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act." Douglas, J., writing for the majority in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973).

This case is far more than a political controversy over annexation. It is the assertion of the rights of the citizens, property owners and taxpayers of the petitioning towns to purchase, on just and reasonable terms, a vital commodity and service, wastewater treatment, from the City of Eau Claire, which has been entrusted with control of the area wastewater facility built in part with federal funds, moneys generated in part by the taxpayers of the towns.

For the reasons set forth herein, *amicus curiae* Town of St. Cloud respectfully requests the Court to reverse the decision of the Seventh Circuit Court of Appeals, and remand the matter to the District Court for a determination on the merits.

Respectfully submitted,

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